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# COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM

35 CENTS PER NUMBER

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MAY, NINETEEN HUNDRED AND TWELVE.

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## NOTES.

PROGRESSIVE INCOME TAXES.—In the recent case of *State v. Frear* (Wis. 1912) 134 N. W. 673, under an amendment to the State constitution declaring a tax on income not to be one on property and authorizing a progressive rate, a progressive income tax was declared valid and not repugnant to any provision of the Federal Constitution. The decision thus involves an inquiry into both the exact nature of an income tax, and the constitutionality of applying a progressive rate thereto. For ninety-seven years a consistent line of decisions had strongly intimated that the only direct taxes in the constitutional sense were land and capitation taxes,<sup>1</sup> but in the famous *Pollock Cases*<sup>2</sup>

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<sup>1</sup>*Hylton v. U. S.* (1796) 3 Dall. 171; *Pac. Ins. Co. v. Soule* (1868) 7 Wall. 433; *Veazie Bank v. Fenno* (1870) 8 Wall. 533; *Scholey v. Rew* (1874) 23 Wall. 331; *Springer v. U. S.* (1880) 102 U. S. 586.

<sup>2</sup>*Pollock v. Farmers' Loan & Trust Co.* (1895) 157 U. S. 429; 158 U. S. 601.

it was held that taxes on land and on personal property are direct, and that taxes on the income therefrom are indistinguishable in their nature; and this holding would seem to imply that such income taxes are indeed property taxes. However, the strict effect of the *Pollock Cases* is that income taxes are direct property taxes within the Federal Constitution,<sup>3</sup> and a possible loop-hole is thus left to argue that for other purposes income taxes are not property taxes. This latter question has never been adjudicated, and no further guiding authority is to be found than that already mentioned; but if taxes on income are in fact equivalent to taxes on property, it is as incompetent for the people of Wisconsin to amend their Constitution as they have done, as it would be for them thus to declare that land is not property and then to tax it on that postulate.

In either aspect, however, it becomes material to inquire as to the constitutionality of a progressive rate of taxation, and this necessarily involves a brief historical résumé. In 1798 a progressive direct tax was laid on houses,<sup>4</sup> but it worked badly in practice<sup>5</sup> and soon fell into disuse, and its constitutionality was never tested. Income taxes have always been recognized in many of our States, and in several a progressive rate has been imposed;<sup>6</sup> and from 1861 to 1870 various Federal progressive income taxes were levied;<sup>7</sup> but again we find no decisions as to whether they violate any provisions of the Federal Constitution.<sup>8</sup> Even in the *Pollock Cases*, which decided that the Federal income tax of 1894 was a direct tax, no opinion was given as to the constitutionality of a progressive rate, the court being evenly divided upon this point.<sup>9</sup> Finally in the State and Federal inheritance tax cases in the Supreme Court, a progressive rate was upheld, an inheritance tax being declared one upon the statutory right to inherit and not one on property.<sup>10</sup> The importance of this distinction is indicated by the words of Brewer J.,<sup>11</sup> who said: "It seems to be conceded that if this were a tax on property such increase in the rate of taxation could not be sustained." In this connection it is to be noted that in a minority of jurisdictions

<sup>3</sup>Fed. Const. Art. 1, § 8, cl. 1.

<sup>4</sup>Seligman, *Progressive Taxation in Theory and Practice*, 29.

<sup>5</sup>Dougherty, *Memorandum in Support of the Proposed 16th Amend. to the Fed. Const.*, 14, 15.

<sup>6</sup>Kennan, *Income Taxation*, 209 *et seq.*; Seligman, *op. cit.*, 103-109.

<sup>7</sup>Seligman, *op. cit.*, 101, 102.

<sup>8</sup>Probably the spirit of patriotism then prevalent, to which are attributed the large returns produced by these Federal taxes, accounts also for the fact that their validity was not attacked. See Kennan, *op. cit.*, 258.

<sup>9</sup>It is to be noted, however, that though this question was expressly raised by counsel, the tax in question did not apply the principle of progression otherwise than by providing for an exemption of incomes of \$4,000.

<sup>10</sup>*Magoun v. Ill. etc. Bank* (1898) 170 U. S. 283; *Knowlton v. Moore* (1900) 178 U. S. 41; Willoughby, *Constitutional Law*, (Students' ed.) 218.

<sup>11</sup>Dissenting as to the progressive rate. *Magoun v. Ill. etc. Bank supra*, 302. On the other hand it is explicitly asserted *arguendo* that under the proposed 16th Amendment Congress could levy progressive income taxes, and impliedly asserted that a State might do likewise. Memorandum submitted by Messrs. Choate, Guthrie, Morawetz, Fox, Milburn & Stetson to the N. Y. Legislature in opposition to the proposed 16th Amend. to the Fed. Const., 14, 25.

progressive inheritance taxes have been held void.<sup>12</sup> Undoubtedly peculiarities of the State constitutions have been responsible for some of these decisions, but this result has in general been reached on the ground that a right of inheritance is property, and as such protected from a progressive tax.<sup>13</sup>

Manifestly the tax involved in the principal case, being authorized by the State constitution, can be attacked, if at all, only through the Fourteenth Amendment, and the decisions to the effect that this Amendment in no wise imposes an unbending rule of equal taxation upon the States<sup>14</sup> are not of much assistance in determining the validity of a progressive tax. It is apparent, then, that the constitutionality of progressive income taxation has never been passed upon with reference to the Fifth or Fourteenth Amendments; that such a rate has been judicially sanctioned only when applied to an inheritance tax; and that an *obiter dictum*, unsupported by authority, is the only Supreme Court utterance on the question of applying such a rate to a tax on property. It is true that exemptions do effect a kind of restricted progression, but the cases construing taxes with such provisions afford little help, as exemptions must for various reasons be deemed *sui generis*.<sup>15</sup> We are thus thrown upon the troubled sea of conflicting economic theories, and when the question is squarely presented to the Supreme Court the elasticity of the "due process" and "equal protection" clauses will entail a decision chiefly determined by the majority view of political economy.<sup>16</sup> It is submitted that this is the true status of the question at present, and that a consideration of the difference in the subject-matter of taxes upon succession and upon income demonstrates the error of the wide-spread assumption that the inheritance tax cases are so analogous as to be controlling.<sup>17</sup>

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NATURE AND VALIDITY OF LICENSE RESTRICTIONS IMPOSED BY A PATENTEE.—The right conferred upon an inventor by the patent law is the purely negative one to exclude others from the fruits of his discovery<sup>1</sup> and, as creature of Federal law, this monopoly is beyond State control.<sup>2</sup> The positive rights of enjoyment possessed by a patentee in his invention are those common to all owners of property and, having

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<sup>12</sup>Gray, Limitations of Taxing Power, §§ 1482-1489.

<sup>13</sup>*Ibid.* Even though the premise be false, it would seem that the reasoning is nevertheless entitled to consideration.

<sup>14</sup>*Bell's Gap R. R. Co. v. Pa.* (1890) 134 U. S. 232, 237.

<sup>15</sup>Gray, *op. cit.*, §§ 1478, 1479. Clearly, practical considerations demand this result. Two reasons may perhaps suffice: the ruinous expenditure necessarily incurred in collecting the smallest taxes; and the fact that if the Government does not exempt the theoretical minimum of subsistence it must make reparation through the medium of its poor laws.

<sup>16</sup>It seems inevitable that a consideration of the reasonableness of the classification will have great weight. See Knowlton *v.* Moore *supra*, 109.

<sup>17</sup>It seems safe to declare that there is scarcely a writer on political economy who does not take for granted that progressive taxation is open to no constitutional objection. See, for instance, Seligman, *The Income Tax*, 532, 533; Ch. VI. § 5.

<sup>1</sup>U. S. Comp. Stat. (1901) § 4884. See *Bloomer v. McQuewan* (1852) 14 How. 539, 549.

<sup>2</sup>*Ex parte Robinson* (1870) 4 Fisher 186; *cf.* *Opinion of Justices* (1907) 193 Mass. 605.